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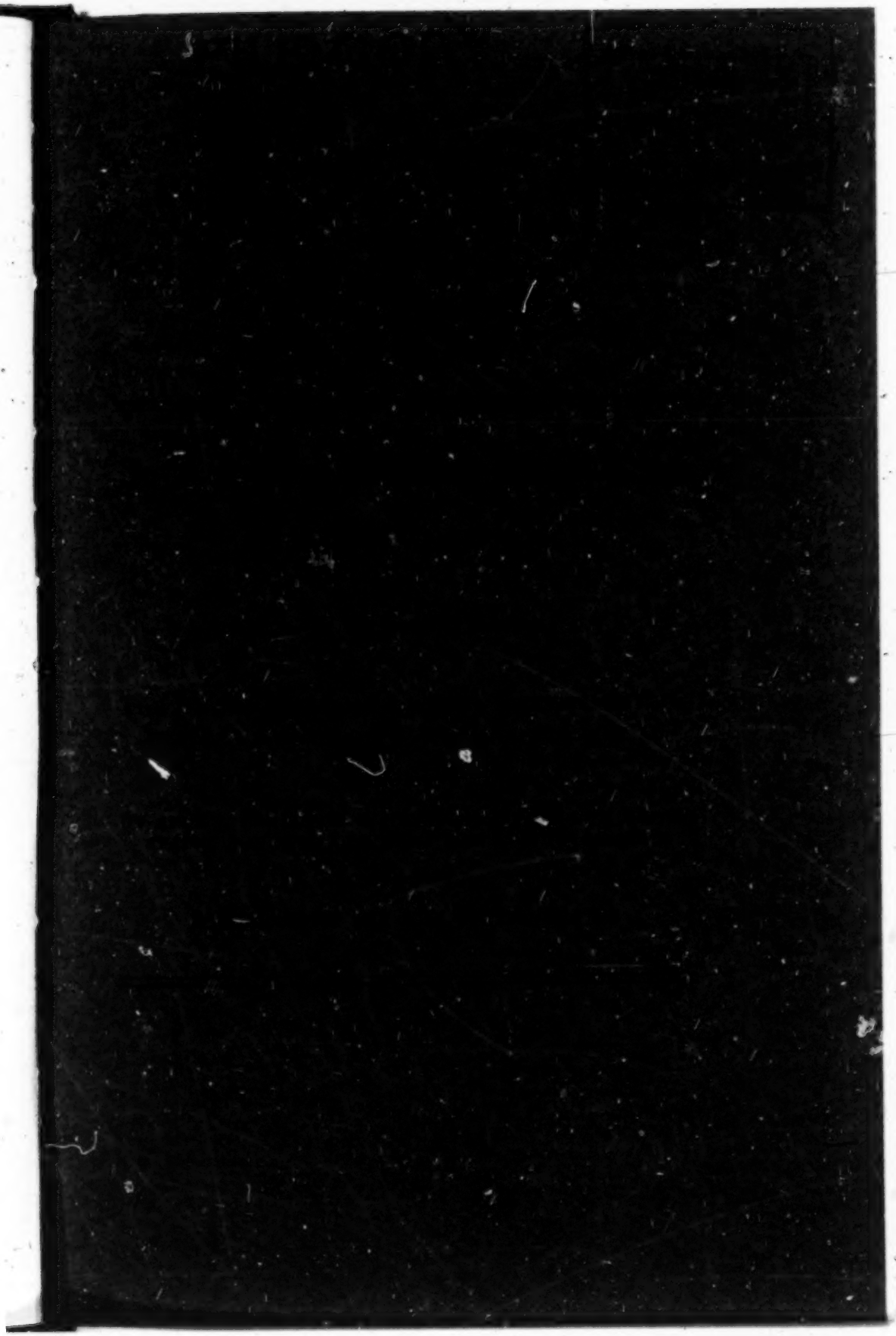

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 577

ARTHUR W. MITCHELL, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES

The United States, one of the five appellees in this case,[1] does not support the judgment of the court below. The legal questions, however, are not entirely clear and the Solicitor General is of the opinion that both this Court and the other appellees are entitled to have presented the arguments which may be advanced in support of the judgment below.

[1] The other appellees are the Interstate Commerce Commission, the trustees of the Chicago, Rock Island and Pacific Railway Company, the Illinois Central Railway Company, and the Pullman Company.

He has, therefore, authorized the Interstate Commerce Commission to file a brief and appear in argument in support of the order of the Commission and the judgment below.[2]

The following memorandum outlines the reasons which have led the United States to the conclusion that the judgment of the court below should be reversed.

STATEMENT

Appellant filed a complaint (R. 3–7) with the Interstate Commerce Commission, charging that the appellee carriers had subjected him to undue and unreasonable prejudice, and praying that they be required in the future to cease and desist from violations of the Interstate Commerce Act and to provide for colored persons holding tickets for first-class accommodations from Chicago, Illinois, to Hot Springs, Arkansas, such first-class facilities as the Commission may deem reasonable and just (R. 6, 7).

The Commission found that the case was "built mainly on an unpleasant experience complainant had about 18 months ago" (R. 21). On the morning of April 21, 1937, the appellant, en route from Chicago to Hot Springs, was compelled under threat of arrest to move from a Pullman car after

[2] Under Section 5 of the Commerce Court Act (36 Stat. 539; see 38 Stat. 208; 28 U. S. C. § 45a) the Commission may appear independently of the United States. See *I. C. C.* v. *Oregon-Washington R. Co.*, 288 U. S. 14, 22–27.

the train crossed the Arkansas border. This was in purported compliance with an Arkansas segregation statute. He held a first-class railroad ticket and offered to pay for his Pullman seat. The appellee carriers, under ordinary circumstances, would have made a Pullman drawing room available, but all were then occupied by white passengers. Appellant accordingly was transferred into a second-class coach reserved for the use of colored passengers.[3] The conductor advised appellant that he could obtain a refund of the extra cost of the first-class ticket, but this has never been claimed by the appellant (R. 21–22).

The Commission on November 7, 1938, dismissed appellant's complaint (R. 34). Four members dissented (R. 30–33), and a fifth dissented in part. Appellant brought suit to set aside this order (R. 1–40). The three-judge district court upon general findings of fact and conclusions of law (R. 52–53) dismissed the cause for lack of jurisdiction[4] (R. 53). Appellant was allowed an appeal (R. 61–62) and this Court noted probable jurisdiction on December 16, 1940.

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[3] There was testimony that this coach was filthy and far inferior to the second-class coach reserved for the use of white persons, but at the time of the hearing a new coach of quality equal to those used by second-class white passengers was in use (R. 22–24).

[4] In the light of the findings, we are of opinion that the dismissal is more accurately described as placed on the merits rather than want of jurisdiction. See *General Inv. Co.* v. *New York Central R. R.*, 271 U. S. 228, 230.

I

Appellant's Standing To Sue

At the threshold of the case lies a question as to appellant's standing to attack the Commission's refusal to issue a cease-and-desist order. It is immaterial that the order dismissing his complaint was negative in form. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125. But neither the complaint nor the findings show that appellant intends in the future to use the appellee carriers between Chicago and Hot Springs, and his complaint is limited to the discrimination to which he was subjected on this run by these carriers.

Standing to attack an order of the Interstate Commerce Commission is probably not an automatic consequence of appearance before the Commission. See *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U. S. 479, 486; compare *The Chicago Junction Case,* 264 U. S. 258, 268. Some independent interest in the order is doubtless necessary. *Moffat Tunnel League* v. *United States,* 289 U. S. 113; cf. *Youngstown Sheet & Tube Co.* v. *United States,* 295 U. S. 476, 479.

However, appellant is probably able to show a pecuniary interest in his attack on the Commission's order. He has brought an action at law for damages against the appellee carriers (R. 21–22). The Interstate Commerce Commission has primary jurisdiction to determine the lawfulness of an

alleged discrimination, and a suit for damages cannot be maintained until the Commission has determined that the discrimination is unlawful. *Robinson* v. *Baltimore & O. R. R.*, 222 U. S. 506; *Morrisdale Coal Co.* v. *Penna. R. R. Co.*, 230 U. S. 304; *Armour & Co.* v. *The Alton Railroad Co.*, No. 293, this Term; cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 433. Accordingly, if the success of appellant's action at law turns on the action of the Commission,[5] he has a pecuniary interest sufficient to attack the order.

More fundamentally, we think that vindication of the rights of the person ranks higher than protection of one's right not to be charged discriminatory rates. While appellant has not shown any specific intention of again using the appellee carriers between Chicago and Hot Springs, few men can so order their personal affairs that their future travels are predictable. Petitioner has already

[5] We suggest below (pp. 19–20) that no question of administrative judgment can properly be found in this case. The "primary jurisdiction" doctrine is based upon the fact that the ordinary case of discrimination involves questions of administrative judgment. If the procedural rule were limited to its reasons, we should accordingly conclude that the court had jurisdiction in this case without regard to the Commission's action. But in matters of procedure, it is sufficient that the reason for the rule applies in *most* cases. If a determination on the merits were to shape the antecedent procedure, there would be an unnecessary sacrifice of procedural simplicity and expedition.

been subjected to one indignity because of his race and, if the discrimination be unlawful, is entitled to guard against its recurrence. See *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151, 163–164. The guaranties of equal treatment cover the occasional traveler as well as the commuter.

II

The Lawfulness of the Discrimination

The majority of the Commission ruled: (1) the appellee carriers were justified in assuming that the Arkansas Separate Coach Law applied to an interstate transportation (R. 28); (2) the carrier practice of segregation would be valid in the absence of the state statute (R. 28); and (3) the small amount of colored traffic, rarely in excess of the available Pullman drawing rooms, made the occasional discrimination when separate Pullman accommodations were not available neither unjust nor undue (R. 29–30).[6]

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[6] Commissioner Eastman dissented, with reluctance because of the practical burdens placed upon the carriers if they were required to provide equal accommodations (R. 30–31). Commissioners Lee, Aitchison, and Porter dissented on the ground that the Interstate Commerce Act required equality of accommodations (R. 31–33). Commissioner Miller dissented in part, on the ground that the Commission should find discrimination against the appellant on this trip, even though ordinarily there would be none, when drawing rooms were available (R. 33).

A. THE ARKANSAS STATUTE

1. *The Segregation.*—This Court on several occasions has ruled that segregation statutes do not violate the Fourteenth Amendment.[7] *Plessy* v. *Ferguson,* 163 U. S. 537; *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151, 160; cf. *Cumming* v. *Board of Education,* 175 U. S. 528, 544–545; *Berea College* v. *Kentucky,* 211 U. S. 45; *Gong Lum* v. *Rice,* 275 U. S. 78, 85–86; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 344. We shall, therefore, assume that the Arkansas statute does not deny equal protection because of its command that colored and white passengers be segregated.

2. *Interstate Passage: Construction.*—The Arkansas Separate Coach Law[8] (Acts of 1891, p. 15, as amended by Acts of 1893, p. 200; Pope's Digest, 1937, Vol. I, Sec. 1190) provides:

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[7] See, also, the numerous decisions of the lower federal courts and the state courts cited in the *Gong Lum* (275 U. S. at 86) and the *Plessy* (163 U. S. at 548) cases, and the decisions upholding state segregation statutes against attack under the commerce clause (*infra*, pp. 8–10). Compare *Pace* v. *Alabama,* 106 U. S. 583.

[8] The entire Act is printed in the Appendix to appellant's brief, pp. 15–17.

Other sections forbid persons, on penalty of a $10–$200 fine, to occupy seats assigned to those of another race (Secs. 1192, 1196); forbid carriers to permit the joint use of sleeping or chair cars (Sec. 1193); require train officers to separate the races, on penalty of a $25 fine (Secs. 1195, 1196); authorize train officers to refuse to carry any passenger who refuses to occupy the assigned coach (Sec. 1197); impose a fine of $100–$500 upon a railway company for every day and every train run in violation of the Act (Sec. 1198); and require that the statute be posted in every coach (Sec. 1199).

> All railway companies carrying passengers in this state shall provide equal but separate and sufficient accommodations for the white and African races by providing two or more passenger coaches for each passenger train; * * *.

The Arkansas courts have not considered whether or not the statute applies to interstate transportation. The statutory language, "All railway companies carrying passengers in this state", is equivocal. We believe, however, that the statute should be construed to apply only to the intrastate transportation of passengers.

In *Louisville &c. Railway Co.* v. *Mississippi*, 133 U. S. 587, 592, this Court sustained a segregation statute phrased in almost identical terms[*] on the ground that the state court had construed it to apply only to intrastate transportation. That case was decided March 3, 1890, one year before enactment of the Arkansas statute. On familiar principles, the Arkansas legislature must be presumed to have adopted this construction. *Keck* v. *United States*, 172 U. S. 434, 436; *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115.

This Court has similarly approved the state court construction of other state segregation statutes, correspondingly equivocal, as applicable only to

[*] The statute there involved required "all railroads carrying passengers in this State (other than street railroads)" to provide separate but equal accommodations (133 U. S. at 588).

intrastate passage. *Plessy* v. *Ferguson,* 163 U. S. 537, 548; *Chesapeake and Ohio Ry. Co.* v. *Kentucky,* 179 U. S. 388, 394. And in *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151, 160, this Court in dictum said that there was "no reason to doubt" that an Oklahoma segregation statute, "in the absence of a different construction by the state court, must be construed as applying to transportation exclusively intrastate". The weight of authority in the state courts is to the same effect. While two state courts have held that segregation statutes cast in general terms apply to interstate as well as intrastate transportation,[10] the courts of six states have limited these statutes to transportation of passengers wholly within the state.[11] These decisions, it is true, do not represent an independent ruling on statutory construction; ordinarily the opinion proceeds under the compulsion of an assumed constitutional prohibition.

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[10] *Smith* v. *State,* 100 Tenn. 494, 46 S. W. 566, writ of error dismissed on motion, 21 S. Ct. Rep. 917, 45 L. Ed. 1256; *Southern Ry. Co.* v. *Norton,* 112 Miss. 302, 73 So. 1; *Alabama & V. R. Co.* v. *Morris,* 103 Miss. 511, 60 So. 11, writ of error dismissed on motion of plaintiff in error, 234 U. S. 766.

[11] *Hart* v. *State,* 100 Md. 595, 60 Atl. 457; *Chiles* v. *Chesapeake and Ohio Ry. Co.,* 125 Ky. 299, affirmed, 218 U. S. 71; *So. Covington &c. Ry. Co.* v. *Kentucky,* 181 Ky. 449, affirmed, 252 U. S. 399; *Abbott* v. *Hicks,* 44 La. Ann. 770; *So. Kansas Ry.* v. *State,* 99 S. W. 166 (Tex. Civ. App.); *Carrey* v. *Spencer,* 36 N. Y. Supp. 886; see, also, *Washington, B. & A. Electric R. Co.* v. *Waller,* 289 Fed. 598 (App. D. C.); *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 186 Fed. 966 (C. C. A. 8th), affirmed, 235 U. S. 151; cf. *Huff* v. *Norfolk & Southern R. Co.,* 88 S. E. 344.

Compare *State Tax Commission* v. *Van Cott,* 306 U. S. 511. But, even if the assumption were unwarranted, the consistent rulings may be supposed to have represented also the expectations of the Arkansas legislature. See *Gwin, etc., Inc.* v. *Henneford,* 305 U. S. 434, 441.

3. *Interstate Passage: Constitutionality.*—If, however, the Arkansas statute were construed as applicable to interstate transportation, it might well then be unconstitutional as a forbidden regulation of interstate commerce.

This Court has never directly ruled upon the question. But in *Hall* v. *De Cuir,* 95 U. S. 485, it held invalid, as a regulation of interstate commerce, a Louisiana statute (of 1869) which forbade common carriers to discriminate on account of race or color. The confusion which would arise from separate and varying state laws was considered conclusive that the subject was for national regulation alone. On the authority of the *De Cuir* case, this Court in dicta has frequently stated or assumed that a state segregation statute could not constitutionally be applied to an interstate passage. *Louisville &c. Railway Co.* v. *Mississippi,* 133 U. S. 587, 590, 591; *Plessy* v. *Ferguson,* 163 U. S. 537, 548; *Chesapeake and Ohio Ry. Co.* v. *Kentucky,* 179 U. S. 388, 394; *Chiles* v. *Chesapeake and Ohio Railway,* 218 U. S. 71, 75; *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151, 160; *South Covington &c. Ry. Co.* v. *Kentucky,* 252 U. S. 399,

403–404, see 407. The lower federal courts and most of the state courts have similarly held that the commerce clause protects the interstate passenger from a state segregation statute. Two state courts, have, however, ruled to the contrary.[12]

The statute, it is true, may be argued to be an exercise of the power of Arkansas to provide for the comfort of those within its borders. If there were an important occasion for the exercise of the so-called police power of Arkansas, the recent decisions of this Court demonstrate that the interstate carrier would not be exempt. *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177; *Arkansas Gas Co.* v. *Department*, 304 U. S. 61; *Welch Co.* v. *New Hampshire*, 306 U. S. 79; *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346; *Clason* v. *Indiana*, 306 U. S. 439; *Maurer* v. *Hamilton*, 309 U. S. 598.

But the distribution of commerce powers between state and nation cannot proceed upon mathematical formulae. The task of this Court under the Constitution is one of adjustment and reconciliation. In performance of this task it cannot, of course, ignore other provisions of the Constitution. The Thirteenth, Fourteenth, and Fifteenth Amendments set up a constitutional policy against racial discrimination. Those amendments

[12] The cases are listed *supra*, p. 9, notes 10 and 11; the decisions represent a blend of constitutional decision and statutory construction.

have been held not to contain any specific prohibition against racial segregation (*supra,* p. 7). But, while they fall short of the specific prohibition, they remain as a factor which must be weighed in the commerce clause adjustments. There is, in other words, no occasion to permit state power to reach into the field of interstate commerce in order to accomplish an end at variance with the basic policy of the Amendments. Compare *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, 391; *United States* v. *Hutcheson,* No. 43, this Term.

We conclude, therefore, that the Arkansas separate coach law is inapplicable to interstate passage, whether as a matter of statutory construction or of constitutional limitation.

B. THE CARRIER'S PRACTICE

In *Chiles* v. *Chesapeake and Ohio Railway,* 218 U. S. 71, this Court ruled that a carrier, without regard to the inter- or intra-state character of the journey, had power by regulation to segregate white and colored passengers. The opinion, analogizing the carrier's power to that of a state, rested upon *Plessy* v. *Ferguson,* 163 U. S. 537.

The Court, in the *Chiles* case did not consider Section 3 (1) of the Interstate Commerce Act, which forbids any carrier from subjecting "any particular person * * * or any particular description of traffic * * * to any undue or

unreasonable prejudice or disadvantage in any respect whatsoever."[13] It is by no means clear that the segregated colored passenger is not in *some* respect subjected to an undue or unreasonable prejudice or disadvantage simply because he is not denied "the equal protection of the laws." The prejudice is clear, and the only question is whether it is "undue" or "unreasonable." The answer to this question would be different according as one looked to the established customs of the region or to the basic concepts of our government, as reflected in the Thirteenth, Fourteenth, and Fifteenth Amendments.

However, the question is one of statutory construction. Whatever might be the correct view if the matter were open to original examination, the long-continued practice of the Interstate Commerce Commission has been to allow segregation by the carriers so long as equal accommodations were

[13] The opinion also ignores the Civil Rights Act of 1875 (18 Stat. 335), Sections 1 and 2 of which forbid public conveyances from refusing equal accommodations because of color. The Act, however, was held unconstitutional in the *Civil Rights Cases*, 109 U. S. 3, as applied within a state. In *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, the Court held that the Act was inseparable, and could not after its invalidation in the *Civil Rights Cases* be applied to interstate carriers by water. Compare, however, *El Paso & Northeastern Railway Co.* v. *Gutierrez*, 215 U. S. 87. We assume, therefore, that appellant is not aided by the Civil Rights Act.

separately provided.[14] This administrative practice, adopted contemporaneously with the Act, must on familiar principles be supposed to have received the approval of Congress.[15] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 524–525; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549. We assume, therefore, that segregation by carrier regulation does not violate the Interstate Commerce Act.

However, it is not wholly clear in this case that there was a carrier regulation of dignity sufficient to come within the rule of *Chiles* v. *Chesapeake and Ohio Railway*, 218 U. S. 71. That case was read in *Washington, B. & A. Electric R. Co.* v. *Waller*, 289 Fed. 598, 601–603 (App. D. C.), to require a formal, published regulation, rather than merely a customary practice, to justify segregation of colored passengers. Under this limitation of the

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[14] See *Councill* v. *The Western & Atlantic R. R. Co.*, 1 I. C. C. 339; *Heard* v. *The Georgia R. R. Co.*, 1 I. C. C. 428; *Heard* v. *The Georgia Railroad Co.*, 3 I. C. C. 111; *Edwards* v. *Nash., Chat. & St. Louis Ry. Co.*, 12 I. C. C. 247; *Cozart* v. *Southern Ry. Co.*, 16 I. C. C. 226; *Gaines* v. *Seaboard Air Line Ry.*, 16 I. C. C. 471; *Crosby* v. *St. L.-S. F. Ry. Co.*, 112 I. C. C. 239. In the four cases first cited discrimination in accommodations was found, in the three last cited it was not.

[15] This inference receives some added support in view of the bills to forbid segregation which have been introduced in Congress only to languish in Committee. See, e. g., H. R. 8821, 75th Cong., 3d Sess.; H. R. 182, 76th Cong., 1st Sess.; H. R. 112, 77th Cong., 1st Sess.

rule, which is not entirely justified by the opinion in the *Chiles* case, it is doubtful that the carrier's practice rose to the formality of a rule or regulation (see R. 24–25; 131, 140, 141, 147, 172, 178).

We have, therefore, some doubt whether any segregation would be warranted on the appellees' Chicago-Hot Springs run. But in view of the conclusions reached in the next section, we think it unnecessary to resolve this question.

C. EQUALITY OF ACCOMMODATIONS

1. *The Rule.*—In every decision of this Court dealing with segregation by carriers it has been assumed that, under the equal protection clause, the separate accommodations must be of equal quality. And in *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151, 161, this Court in considered dictum ruled that "substantial equality of treatment of persons traveling under like conditions cannot be refused." The state courts and the lower federal courts, without exception, have held likewise.[16] The Interstate Commerce Commission has invariably applied the same rule under Section 3 (1) of the Interstate Commerce Act (*supra*, p. 14).

[16] See, e. g., *Mobile & O. R. R. Co.* v. *Spenny*, 12 Ala. App. 375, 387; *Coger* v. *Northwest. Union Packet Co.*, 37 Iowa 145, 153, 156–157; *Ohio Valley Ry.'s Receiver* v. *Lander*, 20 Ky. L. Rep. 913, 917; *Ex parte Plessy*, 45 La. Ann. 80, 84–85, affirmed, 163 U. S. 537; *H[illegible]* v. *State*, 100 Md. 595, 601; *Murphy* v. *Western & A. R. R.*, 23 Fed. 637, 639 (C. C. E. D. Tenn.); *Houck* v. *Southern Pac. Ry. Co.*, 38 Fed. 226, 228 (C. C. W. D. Tex.)

The Arkansas statute itself requires that the accommodations be equal (*supra*, p. 8).

2. *The Equality of Accommodation.*—The actual incident which precipitated the appellant's complaint involved a discrimination because of his color even as compared to second-class white travelers (R. 22–23). But since July 1937 the carrier has put in service a coach for colored passengers which is of equal quality with that used by second-class white passengers (R. 23). Since the complaint asks only relief for the future, it may be assumed that colored passengers who travel second-class have accommodations equal to those open to white passengers at the same fare.

However, the question does not end with travel on second-class tickets. Colored passengers who travel first-class on the appellee carriers are not, we believe, given accommodations which are substantially equal to those open to white passengers. When a drawing room is available, the carrier practice of allowing colored passengers to use one at Pullman seat rates avoids inequality as between the accommodations specifically assigned to the passenger.[17] But when none is available, as on the trip which occasioned this litigation, the discrimination and inequality of accommodation become

[17] Discrimination remains, for an enforced privacy may well be galling and unwelcome. But, in view of the decisions sustaining segregation statutes as applied to interstate commerce (*supra*, p. 7) and segregation regulations of the carriers (*supra*, pp. 12–14), we assume this discrimination to be without legal significance.

self-evident. It is no answer to say that the colored passengers, if sufficiently diligent and forehanded, can make their reservations so far in advance as to be assured of first-class accommodations.[18] So long as white passengers can secure first-class reservations on the day of travel and the colored passengers cannot, the latter are subjected to inequality and discrimination because of their race.[19]

3. *The Small Number of Colored Passengers.*— The Commission accepted the testimony of the railroad conductor that only 10 or 12 times in the past 32 years on the Memphis-Hot Springs run had colored passengers been forced to leave the Pullman for want of separate accommodations; it observed, however, that "what demand there may have been at ticket offices does not appear" (R. 24). The Commission recognized that a discrimination occurred on the specific trip which underlay this proceeding, but ruled that it was not unjust or undue because of the "comparatively little colored traffic" (R. 26–27, 29–30).

This ruling we believe to be erroneous. The Constitution[20] and the Interstate Commerce Act alike

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[18] Commissioner Miller suggested this expedient in his partial dissent (R. 33).

[19] Indeed, even with respect to the colored passenger who secures a drawing room, the Commission found that "there are no dining-car nor observation-parlor car accommodations for the latter and they can not lawfully range through the train" (R. 24).

[20] The equal protection clause of the Fourteenth Amendment would reach to the Arkansas statute; the due-process

make the guaranty of equal treatment one which is personal to each passenger. The majority of the Commission considered that it was dealing with a question of "colored traffic" (R. 29). It was, however, faced instead with an issue of the basic liberties and privileges of citizens. These are secured to each person, not only to those members of groups sufficiently numerous to make the liberty or privilege expedient, or attainable without undue expense or inconvenience.

This Court, in emphatic dictum, so held in *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151, 161–162. In *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351, the Court made a corresponding decision with respect to state educational facilities. It is true that both cases dealt with the effect of the equal protection clause upon state statutes, while here the case deals with a state statute combined with a carrier regulation challenged under the Interstate Commerce Act. But, even assuming the state statute can be ignored and the issue treated as one of a carrier regulation alone, we do not believe that a practice which, if commanded by a state, would be a denial of equal protection of the laws, can escape condemnation under Section 3 (1) as an "undue or unreasonable prejudice or disadvantage in any respect whatsoever." This language, the Court has frequently observed, "is certainly sweeping enough to

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clause of the Fifth Amendment to the action of the Commission (cf. *Heiner* v. *Donnan*, 285 U. S. 312, 326, 338).

embrace all the discriminations of the sort described which it was within the power of Congress to condemn." *The Shreveport Case*, 234 U. S. 342, 356; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 749–750; *Warehouse Co.* v. *United States*, 283 U. S. 501, 512–513.

D. THE EFFECT OF THE COMMISSION'S DETERMINATION

The majority of the Commission, in the last analysis, seems to have directed dismissal of the appellant's complaint because of its finding (R. 29)—

> that the present colored-passenger coach and the Pullman drawing rooms meet the requirements of the act; and that as there is comparatively little colored traffic and no indication that there is likely to be such demand for dining-car and observation-parlor car accommodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, * * *.

Commissioner Eastman, dissenting, recognized the practical difficulties which would follow upon requiring that the discrimination be eliminated, and suggested possible solutions (R. 30–31).

If the issue before this Court called into question the Commission's judgment on these practical or economic obstacles to a removal of the inequality, its decision would not be open to review except upon a charge that it was arbitrary or without support in the evidence. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 366; *Rochester Telephone*

Corp. v. *United States,* 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287. This is the case in the ordinary discrimination complaint. *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361.

But we do not so conceive the issue here. We think there is no room for administrative or expert judgment as to the practical difficulties in removing the discrimination. However great these may be, the common carrier which undertakes to segregate its colored passengers must pay the cost. *McCabe* v. *A., T. & S. F. Ry. Co.,* 235 U. S. 151; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.

CONCLUSION

We therefore conclude that the Commission erroneously supposed that the Arkansas Separate Coach Law applied to an interstate passenger, and erroneously determined that the small number of colored passengers asking for first-class accommodations justified an occasional discrimination against them because of their race. If either of these conclusions is correct, the Commission should be directed to reinstate the appellant's complaint and to proceed in the light of the opinion of this Court.

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